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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 363

PAUL GINSBURG, Petitioner,

v.

HON. DAVE W. LING, Judge of the United States District Court for the District of Arizona at Phoenix, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND APPENDIX.

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v.

HON. DAVE W. LING, Judge of the United States District Court for the District of Arizona at Phoenix, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Ninth Circuit to review its judgment, unaccompanied by an opinion, at No. 17,844 dated and entered April 23, 1962 (App. 1), denying your petitioner's Motion for Leave to File Petition for Writ of Mandamus directed to the respondent, Hon. Dave W. Ling, District Judge of the United States District Court for the District of Arizona at Phoenix, requiring and commanding him to open and vacate the Order entered by him in that Court on March 23, 1962, and also the Judgment entered by

him in that Court on June 19, 1959, at No. Civ. 2664 Phx.; and thereupon to enter Judgment therein for Paul Ginsburg, petitioner herein and interpleaded defendant therein, and against the interpleaded plaintiffs therein, Bonn Kraus Ginsburg and John Paul Ginsburg, Minors by their Guardian Ad Litem, Betty K. Ginsburg.

NO OPINIONS BELOW

In the United States District Court for the District of Arizona at No. Civ.-2664 Phoenix, District Judge Dave W. Ling failed to deliver an Opinion and that Court's Judgment dated and entered on March 23, 1962, is not reported.

In the United States Court of Appeals for the Ninth Circuit at No. 17,844 no Opinion was entered and the Judgment of that Court sought to be reviewed herein (App. 1) is not reported.

JURISDICTION

The Judgment sought to be reviewed was dated and entered April 23, 1962 (App. 1). The timely Petition for Rehearing was denied on May 28, 1962. The time for filing this petition for writ of certiorari expires, therefore, on August 27, 1962.

The jurisdiction of this Honorable Court is invoked under 28 U. S. C., section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

After a biased District Judge arbitrarily and discriminatorily refused *a Motion which sought the adjudication of an unadjudicated issue of lack of considera-*

tion for an alleged oral agreement which would necessarily result in a reversal of that Court's Judgment, was not the denial by the Court of Appeals of a self-sustaining Motion for Leave to File Petition for Writ of Mandamus to compel the District Court to do so, arbitrarily erroneous and

(1) In conflict with decisions of other Courts of Appeals on the same matter and with applicable decisions of this Court; and

(2) Such a departure from the accepted and usual course of judicial proceedings, or a sanctioning of such a departure by a lower Court, as to call for an exercise of this Court's power of supervision?

STATEMENT OF THE CASE

On June 16, 1953, The Mutual Life Insurance Company of New York brought this interpleader proceeding in the United States District Court for the Western District of Pennsylvania at Civil Action No. 11,521, by the filing of a Complaint, allegedly pursuant to provisions of the Judicial Code. Subsequently the proceeds of two policies of insurance on the life of Samuel A. Ginsburg, brother of petitioner, were paid into the registry of that Court. The said insured had died on April 7, 1953.

It is admitted that on November 26, 1952, the decedent-insured had formally and irrevocably named your petitioner the absolute owner, sole beneficiary, premium payer and possessor of said two life insurance policies by duly executing on that day the insurance company's forms for that purpose. Simultaneously your petitioner paid the premiums thereon, then in the grace period, and also paid the subsequent premiums as they

became due until the death of the insured. The said transaction took place in the Phoenix, Arizona, office of The Mutual Life Insurance Company of New York and in due course the original policies of insurance, together with the forms executed by the insured, were forwarded to the Home Office of the insurer to effectuate the endorsements. Thereupon the said original contracts of insurance so endorsed were delivered to your petitioner at his residence, Carlton House, Pittsburgh, Pennsylvania.

The face value of said policies was $30,000.00, but because of loans thereon the policies had only a nominal value when they were assigned to your petitioner. The amount of the interpleaded fund, however, was $27,456.38.

On or about April 17, 1953, the Pittsburgh Agent of The Mutual Life Insurance Company of New York issued a receipt to your petitioner for the policies, being surrendered for payment. Subsequently, when the payment was not forthcoming, your petitioner learned that the ex-wife of the decedent-insured and her Phoenix divorce attorney (Samuel Langerman, Esquire) had been communicating with the insurer, framing a claim that the proceeds should be paid to petitioner only as trustee for the two then minors.

Failing in her effort to procure a compromise or nuisance share of the policy proceeds from the insurer, and for the sole purpose of advancing a scheme so to do, suit was filed on May 1, 1953, by the decedent's ex-wife, then Betty K. Ginsburg (now Betty K. Hilsdorf) in the United States District Court for the District of Arizona at Civ. No. 1882 Phoenix. Named as defendants therein

were the insurer and your petitioner, and the claim was that your petitioner be declared a trustee of the proceeds for her two sons, who then were minors, under an alleged oral trust created "at the time" when your petitioner, in writing, was made the absolute owner, sole beneficiary, premium payer and possessor of the policies. *During the course of the interpleader proceedings, Mr. Anderson, the Phoenix agent of the insurer, swore in Depositions that "at the time" of the transaction there was no mention of any trust and that, if there were, he would have given the decedent-insured different forms to sign; that the only persons then present were the insured, your petitioner, and himself; further that he gave the routine explanation that henceforth the insured could not exercise any rights in the policies, but only his brother, Paul, could, to which the insured (an attorney) replied that he (the insured) knew it and that is the way he wanted it to be; and also that the insured appeared to know exactly what he was doing.*

After the said suit was filed in Phoenix, your petitioner on May 11, 1953, to protect his rights, sued The Mutual Life Insurance Company of New York for the proceeds under his contracts, in the United States District Court for the Southern District of New York at Civil Action No. 8533. Then the insurer interpleaded the fund, over the opposition thereto of your petitioner.

It was evident from the Phoenix Complaint of the then Betty K. Ginsburg, not only that the Arizona District Court lacked jurisdiction over the person of your petitioner and that the Complaint was insupportable and unprovable, but also that the Complaint on its face failed to state a claim upon which relief could be granted

against the insurer. In order to avoid this distasteful litigation, petitioner requested the insurer to present a motion to dismiss that Complaint but it refused so to move. Even after your petitioner offered to pay all fees and expenses in connection therewith, the insurer still refused so to move. It should be pointed out here that subsequently your petitioner's Motion to Dismiss said Phoenix Complaint was granted on March 31, 1958, because the Court "has no jurisdiction over his person". The Arizona District Court nevertheless permitted this action to go to trial there after a transfer of the cause.

In a final and vain attempt to avert this interpleader, your petitioner notified the insurer this proceeding was not authorized by the Judicial Code or the applicable law because both claimants alleged that the funds should be paid to Paul Ginsburg. Your petitioner claimed the fund for himself, individually; and his adversary claimed that it should be paid to him as a trustee. All that the insurer had to do, therefore, in order to avoid dual liability, was to issue its check to the order of Paul Ginsburg, individually and/or as trustee. It is elementary that the insurer had no right or duty to go any farther, as to see to the administration of the "trust", *et cetera.*

After the fund was paid into the registry of the Western Pennsylvania District Court, the subsequent proceedings were long and protracted, all of them being adequately described and set forth in the Petition for Writ of Mandamus, which is the subject of review herein. The said Petition for Writ of Mandamus is appended hereto for the convenience of the Court (App. 2-11), and is incorporated by reference in this Statement of the Case because its averments authoritatively show, with record support, that

(1) The transfer of the cause from the Western Pennsylvania District to the Phoenix, Arizona District, pursuant to a Motion for Change of Venue, purportedly under 28 U. S. C. A., sec. 1404 (a), was obtained through fraud upon the Court, as well as through fraud upon your petitioner.

(2) The said fraud was not discoverable prior to the trial at Phoenix wherein it was made quite evident, but was sanctioned by the respondent, Judge Dave W. Ling, who refused to retransfer the cause to the transferor Court.

(3) The respondent, Judge Ling, entered a Judgment against your petitioner without a scintilla of evidence to support it and under such circumstances as to manifest his bias and prejudice against your petitioner. Hon. Dave W. Ling, respondent, not only entered Judgment for petitioner's adversaries in the amount of the interpleaded fund, but also an unprecedented affirmative Judgment against your petitioner for interest, fees and costs, currently approximating $16,000.00.

(4) Subsequent to the said Judgment, proceedings in the Western Pennsylvania District and in the Court of Appeals for the Third Circuit have resulted in decisions which make it *res judicata* that those Courts are without jurisdiction to adjudicate or to review any of the issues involved herein; proceedings in this Honorable Court have resulted in refusals to review. Thus the only jurisdiction available to your petitioner was in the Arizona District Court wherein the Judgment was rendered, and in the Court of Appeals for the Ninth Circuit.

(5) In the proceeding before this Honorable Court at No. 551 October Term, 1960, your petitioner's contention that the Pennsylvania District Court never lost jurisdiction and the Arizona District Court never acquired jurisdiction of the cause was neither reviewed nor reversed. Accordingly, your petitioner submitted to the respondent, Hon. Dave W. Ling, his timely Motion for Reconsideration of Judgment, moving the Court to vacate its Judgment entered against him on June 19, 1959, and upon reconsideration, to enter judgment for him and against the plaintiffs in view of the Pennsylvania Supreme Court decision in the analogous and applicable case in the Third Circuit of *Lois and Michael Gershman, minors by Rhoda Gershman, their guardian, appellants, v. Metropolitan Life Ins. Co. and Dorothy Gershman,* 176 A-2d 435, 1962. It was evident therefrom that in rendering the Judgment in the instant case, Judge Ling erroneously failed to pass upon the basic issue of lack of consideration, which issue could be considered the crux of the case. The petitioner's adversaries had never averred or attempted to prove that there was any consideration for his alleged promise to receive the insurance proceeds as a trustee for them, instead of for himself individually, and there was not even an intimation of why your petitioner who owned the insurance contracts was paying the premiums for anyone other than himself. Thus Judge Ling had overlooked or misapprehended the crucial point that *there was no consideration* to support the alleged unproved and unprovable oral agreement, heavily relied upon by the interpleaded plaintiffs below as the sole basis of their claim.

(6) Petitioner's said Motion for Reconsideration of Judgment detailed the similarities of the fact situation in the Gershman case to those of the instant case, and then made it evident that the conclusion reached in that case that *a proved written agreement* to make the decedent-insured's two children the sole beneficiaries of his insurance proceeds failed for lack of consideration, should apply *a fortiori* in the instant case where the two children relied upon *an alleged oral agreement* unsupported by any consideration.

(7) Your petitioner's said Motion for Reconsideration of Judgment was self-sustaining, and his Reply to Opposition of Interpleaded Plaintiffs to Motion for Reconsideration of Judgment showed that there was no legal opposition thereto whatever and that actually the said Opposition was demurrable. The respondent, Judge Ling, however, entered an Order on March 23, 1962, unaccompanied by an opinion, denying the said Motion.

(8) The actions of the respondent, Hon. Dave W. Ling, including the entry of the Judgment by him on June 19, 1959, and the entry of his Order dated March 23, 1962, have deprived your petitioner of important rights and property without due process of law in violation of his federally guaranteed rights under the Constitution and laws of the United States.

Thereupon your petitioner's timely Motion for Leave to File Petition for Writ of Mandamus was filed in the Court of Appeals for the Ninth Circuit, wherein it was summarily denied by an Order of Circuit Judges Hamley, Hamlin and Koelsch, unaccompanied by an opinion, on April 23, 1962. The timely Petition for Rehearing thereon was denied on May 28, 1962. Hence the instant Petition for Writ of Certiorari herein.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Actions Of The Court Of Appeals In Entering The Judgment Sought To Be Reviewed Were Discriminatorily Arbitrary; In Conflict With Decisions Of Other Courts Of Appeals On The Same Matter And With Applicable Decisions Of This Court; And Constituted Such A Departure From The Accepted And Usual Course Of Judicial Proceedings, Or A Sanctioning Of Such A Departure By A Lower Court, As To Call For An Exercise Of This Court's Power Of Supervision.

It is evident from the Petition for Rehearing in the Court of Appeals that your petitioner's Motion for Leave to File Petition for Writ of Mandamus was hurriedly denied by Circuit Judges Hamley, Hamlin and Koelsch without the benefit of the record, which they were requested to await, being informed that it was en route. Such indifference to full consideration on the merits, and refusal even to allow the filing of the Petition for Writ of Mandamus, justify your petitioner in arguing that the actions of those Circuit Judges were arbitrary and capricious. It is respectfully submitted that the Petition for Writ of Mandamus (App. 2-11), authoritatively self-sustaining, should have been granted under the decisions of any Circuit, as has been pronounced by this Honorable Court. See the case of *Beacon Theatres, Inc. v. Hon. Harry C. Westover,* 79 S. Ct. 948, 1959, wherein it was held in a Ninth Circuit case that the Courts of Appeals have the authority and power to issue extraordinary writs under the All Writs Act, 28 U.S.C.A. sec. 1651, and they should exercise their authority and power to do so.

When Judge Ling denied your petitioner's Motion for Reconsideration of Judgment, he did so with the benefit of the entire record, which made it plain that there was no consideration for the alleged oral agreement of your petitioner upon which his adversaries placed their sole reliance as the basis of their claim. The jurist was also advised that under the law of the instant Circuit, as well as the law of the Third Circuit, wherein the 1962 decision was entered in the case of *Lois and Michael Gershman, minors by Rhoda Gershman, their guardian, appellants, v. Metropolitan Life Ins. Co. and Dorothy Gershman,* 176 A. 2d 435, he had no legal alternative but to reverse and vacate the Judgment entered by him against your petitioner on June 19, 1959, and thereupon to enter a Judgment in favor of your petitioner and against his adversaries, on reconsideration. Thus the actions of Judge Ling, as well as the actions of the Honorable, Frederick G. Hamley, Oliver D. Hamlin, and M. Oliver Koelsch, Circuit Judges, entered conflicts with the instant, as well as other Courts of Appeals on that same matter, which would invoke the sound judicial discretion of this Honorable Court to review the matter.

The thing that makes the errors below so obvious is the point that in the Gershman case the agreement which failed for lack of consideration was proved and in writing, while in your petitioner's case the "agreement" which did not fail for lack of consideration, was unproved and allegedly oral.

The Judges of the lower courts, through failure to follow the applicable provisions of the Canons of Judicial Ethics, which require that their decisions be supported by legal opinions showing that they have con-

sidered all serious arguments of counsel and adjudicated all issues presented under the Constitution and laws of the United States, cannot by inference claim off the record that they have judicial protection from this Honorable Court for the errors of their ways because of prior denial of certiorari. Your petitioner submitted to both the District Court and the Court of Appeals the case of *Elgin, Joliet & Eastern Rwy. Co. v. Gibson*, 355 U. S. 897, 1957, citing Brown v. Allen, 344 U. S. 443, wherein this Honorable Court repeated its pronouncement that the denial of certiorari "does not imply approval of the decision for which review is sought or of its supporting opinion".

In view of the foregoing, it is respectfully submitted that the lower Courts did not support their decisions because they could not factually and legally support them. Thus it necessarily follows that the Judgment sought to be reviewed (App. 1) was arbitrarily erroneous, and constitutes such a departure from the accepted and usual course of judicial proceedings, or a sanctioning of such a departure by a lower Court, as to call for an exercise of this Court's power of supervision, — also a ground for invoking the sound judicial discretion of this Honorable Court to review the cause.

CONCLUSION

This petition for a writ of certiorari should be granted in order to make it plain to the lower Courts that litigants must be afforded their constitutionally guaranteed right to due process of law and the protection of the Canons of Judicial Ethics, with the result in the instant case that the petitioner's contracts with The Mutual Life Insurance Company of New York must be inviolable; and so that this Honorable Court will resolve the conflicts entered herein and make it manifest that it will exercise its power of supervision over the lower Courts.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner
Carlton House, 550 Grant Street
Pittsburgh 19, Pennsylvania

Dated: 21 August 1962.

APPENDIX

Judgment

PAUL GINSBURG, Petitioner
v.
HONORABLE DAVE W. LING, Respondent.
No. 17844

At a stated Term, to wit: The October Term 1962, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-third day of April, in the year of our Lord one thousand nine hundred and sixty-two.

PRESENT:

Honorable FREDERICK G. HAMLEY, Presiding,
Honorable OLIVER D. HAMLIN,
Honorable M. OLIVER KOELSCH,
U. S. Circuit Judges

ORDER DENYING PETITION

The petition for leave to file petition for writ of mandamus coming on this day for hearing, and no appearances being made in open court on behalf of either party, the petition was duly submitted.

Upon consideration thereof IT IS ORDERED that the petition for leave to file petition for writ of mandamus be, and the same hereby is denied.

Petition for Writ of Mandamus

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL GINSBURG, Petitioner, vs. HON. DAVE W. LING, Judge of the United States District Court for the District of Arizona at Phoenix, Respondent.	No. 17,844

To the Honorable, the Chief Judge and the Judges of said Court:

The petition of Paul Ginsburg, petitioner for Writ of Mandamus, being without other adequate and specific remedy for relief, respectfully represents:

1. Petitioner, Paul Ginsburg, is a citizen and resident of the City of Pittsburgh, County of Allegheny, Commonwealth of Pennsylvania; and is a member in good standing of the bar of State and Federal Courts, including the Supreme Court of Pennsylvania and the Supreme Court of the United States.

2. Respondent, Hon. Dave W. Ling, is a Judge of the United States District Court for the District of Arizona at Phoenix, within the jurisdiction of this Honorable Court.

3. The respondent as District Judge presided over a certain proceeding at No. Civ. 2664 Phx. captioned The Mutual Life Insurance Company of New York, a

corporation, vs. Bonn Kraus Ginsburg and John Paul Ginsburg, Minors, Betty K. Ginsburg and Paul Ginsburg, *Framed Issue*: Bonn Kraus Ginsburg and John Paul Ginsburg, Minors by their Guardian Ad Litem, Betty K. Ginsburg, Plaintiffs, vs. Paul Ginsburg, Defendant.

4. It was a matter of record in that proceeding before District Judge Ling that your petitioner, interpleaded defendant therein, was the absolute owner, sole beneficiary, premium payer and possessor of policies of insurance on the life of his brother; and that the interpleaded plaintiffs therein claimed the proceeds of those insurance policies through an alleged oral trust which supposedly provided that your petitioner was to receive the proceeds as a trustee for them instead of for himself absolutely as provided in the written contracts of insurance.

5. The interpleader proceeding was originally commenced in the United States District Court for the Western District of Pennsylvania at Civil Action No. 11521, from which it was transferred to the Arizona District pursuant to a Motion under Section 1404 (a) of the Judicial Code. During the course of the trial before respondent, Judge Ling, it was evident that the transfer to the Arizona District was procured through fraud and misconduct of your petitioner's adversaries; but the respondent, nonetheless, being cognizant of the said fraud and misconduct, refused to retransfer the cause to the transferor Court. The fraud and misconduct of petitioner's adversaries consisted of false representations made by the interpleaded plaintiffs themselves and through their attorneys in the Western Pennsylvania District Court, concerning their poor financial condition

which made it impossible for them to prosecute their complaint in Pennsylvania, by which they obtained sympathetic consideration of their Motion for Change of Venue to Phoenix, Arizona, for the convenience of "three other witnesses", who could and would testify in support of their alleged oral trust. It was discovered at the trial before the respondent, Judge Ling, that the interpleaded plaintiffs' trust funds in Pittsburgh, Pennsylvania, are worth in excess of a quarter of a million dollars; and that the "three other witnesses", all of whom were available but only two of whom were called, could not testify in support of their complaint. As a matter of fact, their "witnesses" testified in opposition to the alleged oral trust of the insurance proceeds by swearing that the decedent-insured had not made any mention to them whatever of the policies of life insurance when he supposedly had told them that if anything should happen to him, his children were well provided for. The applicable authorities hold that judgments procured by fraud should be vacated, even when the injured party may have been derelict in bringing the fraud to the Court's attention. It is elementary, therefore, that the respondent should have vacated the Order of Transfer. See *Root Refining Co. v. Universal Oil Products Co.; American Safety Table Co. v. Singer Sewing Machine Co.*, 169 F. 2d 514, certiorari denied, 335 U. S. 912, rehearing denied, 336 U. S. 915. See also *Griffin v. Griffin*, 327 U. S. 220, rehearing denied, 328 U. S. 876; and *Massachusetts v. Missouri*, 308 U. S. 1, 19. Support for this point is also found in the case of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, rehearing denied 322 U. S. 772, wherein the Supreme Court reversed the Court of Appeals for the Third Circuit (137 F. 2d 764). Therein it

was held, *inter alia,* that the court had the power to remedy an apparent fraud perpetrated on it eleven years before. The respondent's refusal to retransfer the cause entered a conflict with the foregoing authorities, as well as a conflict with the cases of *Wilson v. Kansas City Southern Railway Co.*, D.C. Mo., 1951, 101 F. Supp. 56; *Nardi v. Poinsatte,* 46 F. 2d 347; and West's Ann. Code Civ. Proc., secs. 399, 963, subd. 2 (*Badella v. Miller,* 279 P. 2d 729).

6. It was further evident that there was not a scintilla of admissible testimony or evidence before the respondent, Judge Ling, to establish the alleged oral trust; but the respondent, nonetheless, entered Judgment for the interpleaded plaintiffs and against the interpleaded defendant, your petitioner, on June 19, 1959. The alleged oral trust was claimed by the interpleaded plaintiffs to have been created "at the time" when the decedent-insured had made your petitioner the absolute owner, sole beneficiary, premium payer and possessor of the insurance contracts, in writing, on forms furnished by the insurer for that purpose, which transaction was entered into at the office of the Mutual Life Insurance Company of New York. At the trial nothing was offered even to attempt to establish an oral trust or any of its terms *at the time* or *after the time.* Only loose *conversation was offered* over objection to create a false impression that the decedent-insured said that his two children were taken care of *before the time,* which was incompetent, irrelevant, immaterial, hearsay or untrue. But even if that testimony were competent, relevant, material, admissible and true, it could not possibly have established a trust. A parol trust of personalty

must be established by clear and convincing evidence, *as to its existence and all of its terms. Allen v. Withrow,* 110 U. S. 119; *Carillo v. Taylor,* 299 P. 2d 188, 81 Ariz., 14; *Muriello v. Hernandez,* 281 P. 2d 786, 79 Ariz., 1; *Stewart v. Schnepf,* 158 P. 2d 529, 62 Ariz., 440; *Costello v. Cunningham,* 147 P. 701, 16 Ariz., 447; 23 A.L.R. 1500, p. 1528; 20 Am. Jur., Evidence, sec. 1253; 32 C.J.S. Evidence, par. 1023. Furthermore, there is no evidence that your petitioner ever accepted any such alleged trust, either expressly or constructively. All of the elements of a trust must be proved by a very high degree of proof; and if any of the elements is missing, that is fatal to the trust. 54 Am. Jur. Trusts, sec. 30. *Carillo v. Taylor, supra,* Assuming *arguendo* that the plaintiffs' testimony did (through some inconceivable elasticity of the law) establish a trust, then the supposed trust would positively have been revoked by the subsequent outright transfer to your petitioner. *The law on that point of revocation is elementary.* Furthermore, an insurance policy must be interpreted by first looking to the language of the contract; and where the terms thereof, as here, are not contradictory, the parol evidence rule excludes testimony, as offered here, to vary or contradict the terms of the integrated writings such as petitioner's contracts of insurance. It was utterly impossible, therefore, for the guardian ad litem to have established a trust created *at any time.* Thus, it was further evident from the record before the respondent that the said alleged oral trust was not only unproved, but also unprovable.

7. The said Judgment entered against your petitioner had not only been procured through fraud and

misconduct of your petitioner's adversaries, but also had been entered in a Court that lacked jurisdiction. District Judge Ling's lack of jurisdiction was based upon the point that the Order of Transfer, being void for fraud, the transferor Court did not lose jurisdiction and the transferee Court (District Judge Ling) did not acquire jurisdiction. Incidentally, your petitioner sought relief from Judge Ling's void Judgment through proceedings in the Western Pennsylvania District Court, including a Motion under F.R.C.P. Rule 60 (b), and in the Court of Appeals for the Third Circuit; but any such relief was refused for lack of jurisdiction. Thus, it is res judicata that the jurisdiction must lie in the Arizona District Court and in this Honorable Court.

8. Your petitioner in due course and strictly in compliance with the Federal Rules of Civil Procedure then took an Appeal from that Judgment to this Honorable Court at No. 16,768, wherein the caption of the Appeal was Paul Ginsburg, Appellant, v. Bonn Kraus Ginsburg and John Paul Ginsburg, Minors, by their Guardian Ad Litem, Betty K. Ginsburg, Appellees. During the pendency of a preliminary Motion of your petitioner in that Appeal, a Motion to Dismiss the Appeal was granted on an illegal technicality through fraud and misconduct of your petitioner's adversaries. That fraud and misconduct of petitioner's adversaries consisted of false representations made by the attorneys for the appellees in the Motion to Dismiss the Appeal that "Appellant has not perfected his appeal by filing and serving a statement of the points upon which he intends to rely and a designation of the portions of the record material to the consideration of the appeal as required by

Rules 75 (a) and 75 (d) Federal Rules of Civil Procedure", all of which misrepresentations were and are refuted by the record. Furthermore, their Motion to Dismiss the Appeal failed to comply with this Court's Rule 15, and particularly because the Motion was not supported by adffiavits.

9. Your petitioner thereupon presented in the Supreme Court of the United States at No. 551 October Term, 1960, a Petition for Writ of Certiorari, which was denied. Although the Supreme Court did not state any of its reasons for refusing to review the case, such refusal could not have been on the merits but might very well have been for lack of a record in the lower Courts, which should have formed a basis for a review. As a result, your petitioner is justified in arguing that the respondent's refusal to adjudicate the aforesaid issues deprived your petitioner of his right to a review. The Supreme Court has repeatedly held, however, that the denial of certiorari "does not imply approval of the decision for which review is sought or of its supporting opinion". See *Elgin. Joliet & Eastern Rwy. Co. v. Gibson*, 355 U. S. 897, 1957, citing *Brown v. Allen*, 344 U.S. 443.

10. After the Supreme Court had declined to review the case, your petitioner then submitted to the respondent, District Judge Ling, his Motion for Reconsideration of Judgment, moving the Court to vacate its Judgment entered against him on June 19, 1959, and upon reconsideration, to enter judgment for him and against the plaintiffs in view of the Pennsylvania Supreme Court decision in the analogous and applicable case in the Third Circuit of *Lois and Michael Gershman,*

minors by Rhoda Gershman, their guardian, appellants, v. Metropolitan Life Ins. Co. and Dorothy Gershman, 176 A-2d 435, 1962. It was evident therefrom that in rendering the said Judgment, the respondent erroneously failed to pass upon the issue of lack of consideration, overlooking or misapprehending the point that there was no consideration to support the alleged oral agreement relied upon by the interpleaded plaintiffs. It necessarily should follow that the alleged oral trust, even if true and provable, was void for lack of consideration, which should have left the respondent no legal alternative but to vacate the Judgment entered by him on June 19, 1959 and thereupon to enter Judgment for your petitioner and against the interpleaded plaintiffs.

11. Petitioner's said Motion for Reconsideration of Judgment detailed the similarities of the fact situation in the Gershman case to those of the instant case and then made it evident that the conclusion reached in that case that a *written agreement* to make the decedent-insured's two children the sole beneficiaries of his insurance proceeds failed for lack of consideration, should apply *a fortiori* in the instant case where the two children relied upon *an alleged oral trust agreement* unsupported by any consideration.

12. Your petitioner's said Motion for Reconsideration of Judgment was self-sustaining, and his Reply to Opposition of Interpleaded Plaintiffs to Motion for Reconsideration of Judgment showed that there was no legal opposition thereto whatever and that actually the said Opposition was demurrable. The respondent, Judge Ling, however, entered an Order on March 23, 1962, unaccompanied by an opinion, denying the said Motion.

13. It is respectfully submitted that the actions of the respondent, including the entry of the Judgment by him on June 19, 1959, and the entry of his Order dated March 23, 1962, have deprived your petitioner of his rights under the Constitution and laws of the United States, and particularly have deprived him of important rights and property without due process of law in violation of his federally guaranteed rights under the Fifth and Fourteenth Amendments to the Constitution.

14. This Honorable Court should compel Hon. Dave W. Ling, respondent, to vacate his said Order of March 23, 1962 and then his said Judgment of June 19, 1959; and thereupon to enter Judgment in that proceeding in favor of your petitioner, the interpleaded defendant therein, and against the interpleaded plaintiffs therein.

15. It is respectfully submitted that the granting of this petition for writ of mandamus is authorized and required under the All Writs Act, 28 U.S.C.A. sec. 1651. See the case of *Beacon Theatres, Inc. v. Hon. Harry C. Westover,* 79 S. Ct. 948, 1959.

WHEREFORE, your petitioner respectfully prays that this Honorable Court will issue a writ of mandamus directed to the respondent, Hon. Dave W. Ling, District Judge of the United States District Court for the District of Arizona at Phoenix, requiring and commanding him to open and vacate the Order entered by him in that Court on March 23, 1962 and also the Judgment entered by him in that Court on June 19, 1959 at No. Civ. 2664 Phx.; and thereupon to enter Judgment therein for Paul Ginsburg, petitioner herein and interpleaded defendant

therein, and against the interpleaded plaintiffs therein, Bonn Kraus Ginsburg and John Paul Ginsburg, Minors by their Guardian Ad Litem, Betty K. Ginsburg.

Respectfully submitted,

PAUL GINSBURG, Petitioner and
Counsel for Petitioner
Carlton House, 550 Grant Street
Pittsburgh 19, Pennsylvania
GRant 1-6060

AFFIDAVIT

Commonwealth of Pennsylvania }
County of Allegheny } ss.:

Before me, a Notary Public in and for said County and State, personally appeared Paul Ginsburg, petitioner, who being duly sworn according to law deposes and says that the facts set forth in the foregoing petition are true and correct.

PAUL GINSBURG

Sworn to and subscribed before me this 2nd day of April, 1962.

IRENE S. AUGHENBAUGH,
[SEAL] Notary Public
Pittsburgh,
Allegheny County, Pa.

My Commission Expires January 17, 1965.